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Battery 2.0: Upgrading Offensive Contact Battery to the Digital Age

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I. INTRODUCTION

Under the law of torts, prospective plaintiffs have numerous causes of action for various physical harms that confront people daily. As technology advances, people are increasingly confronted with a wide range of digital actions that were unanticipated by early tort law — digital actions that cause a person to suffer real-world physical harm.

In response, courts have begun tailoring traditional tort principles to protect against harmful online activities. For example, in 1998 a plaintiff successfully sued Continental

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Express after a pilot took a photo of the plaintiff and superimposed the plaintiff's face onto online nude photographs.¹ In 2000, EBay won a trespass to chattel judgment against Bidder's Edge after Bidder's Edge used spiders to data mine EBay's website.² Online cyber-harassment claims have also led to positive results for plaintiffs by providing relief to plaintiffs who suffered real-world harm from a defendant's online actions.³

Some scholars still argue that limitations exist on the application of current tort law to harmful online activities. Benjamin Duranske, for example, argues that certain limitations currently prevent the application of traditional touch-based torts to online conduct.⁴ In analyzing the possibility of online touch-based torts, Duranske maintains that such torts are barred by concepts such as the doctrine of consent⁵ or the "magic circle"⁶ of play theory.⁷ Duranske's argument is elegantly summarized:

No matter how dangerous a sword-swinging Level 70 Night Elf appears in World of Warcraft, he can't *really* hurt the physical player behind the keyboard, and everyone knows that. The same is true regarding periodic claims of 'virtual rape.' No matter how offensive, objectionable, and wrong it may be for someone to cause an unwanted sexual animation or text

¹ Butler v. Continental Express, Inc., No. 96-1204096, 1998 WL 2023763 (Tex. Dist. Ct.-9th June 8, 1998) (awarding plaintiff damages for defamation per se, intentional infliction of emotional distress, invasion of privacy, and punitive damages).

² Ebay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 2000).

³ See, e.g., Sec'y, United States Dep't of Hous. & Urban Dev. v. Wilson, No. 03-98-0692, 2000 WL 988268 (H.U.D. A.L.J. July 19, 2000) (awarding a white female and her bi-racial daughter \$283,683.64 and \$827,793.75 respectively for violations of 42 U.S.C. § 3617 (2006), and emotional distress suffered from threats posted on a white supremacist webpage). See also Catherine E. Smith, *Intentional Infliction of Emotional Distress: An Old Arrow Targets the New Head of the Hate Hydra*, 80 DENV. U. L. REV. 1, 33-61 (2002) (offering a detailed discussion of the Wilson case and its implications).

⁴ BENJAMIN TYSON DURANSKE, VIRTUAL LAW: NAVIGATING THE LEGAL LANDSCAPE OF VIRTUAL WORLDS 179-80 (2008) (proposing that touch-based torts cannot exist until technology moves into the realm of player immersion through things such as virtual reality).

⁵ Consent is defined as "willingness in fact for conduct to occur." RESTATEMENT (SECOND) OF TORTS § 892(1) (1965). This view encompasses the principle of *volenti non fit injuria*, or "the volunteer suffers no wrong." Thus, effective consent constitutes a complete bar to tort liability. RESTATEMENT (SECOND) OF TORTS § 892A (1965).

⁶ See generally JOHAN HUIZINGA, HOMO LUDENS: A STUDY OF THE PLAY ELEMENT IN CULTURE (1970) (explaining that, under his "magic circle" theory, play should be protected from the reach of the real world and, to a degree, the real world should be protected from activities defined as play). Under Huizinga's theory, tort law is not applicable to play activities.

⁷ DURANSKE, *supra* note 4, at 178-80.

involving a user's avatar to appear on that user's computer screen, it simply does not meet any state's legal definition of "rape" [A]ctual, actionable assault and battery that require physical contact are simply not possible in virtual worlds and games. At least not yet.⁸

Duranske is correct that cyber-battery theory does not apply (except in limited circumstances) to online games such as World of Warcraft, where touching that might give rise to the tort is almost always consensual. Yet even Duranske recognizes that free-form social worlds are governed differently than a game environment such as Ultima Online or World of Warcraft.⁹ People who participate in free-form social worlds could apply tort law to protect themselves against harms suffered online. However, these tort principles need not be limited, and could potentially protect people engaging in a wider variety of online activity.

People who engage in online activities are potentially affected by a digital harm. Though these individuals may suffer relatively minor physical injury, they may suffer incredibly intense psychological injury as a result of the harmful conduct. Current tort law provides these individuals only minimal options, if any, to redress the harm they suffered, and current criminal law may provide no options at all.

For instance, if a person hacks into another's personal website, Facebook account, or Second Life account, courts may find him criminally liable for unauthorized use of a computer or hacking, and may suffer a criminal penalty.¹⁰ The overall goal of the prosecution is to protect society as a whole from similar actions. However, the individual victims of hacking and similar crimes have few options in seeking recovery for the harms they suffered, and for the costs they have incurred to make themselves whole.

In the civil realm, there are only minimal remedies for computer based crimes and other wrongs. Plaintiffs may seek recovery for physical harm to damaged property. However, this action is likely precluded if there was also an intentional infliction of emotional distress suit. Similarly, if plaintiffs are limited to a simple action for trespass, it is unlikely they recover any psychological damages that they suffer.

⁸ *Id.* at 180.

⁹ *Id.* at 179-80.

¹⁰ For example, under California law, a person who intentionally hacks into another person's Facebook account without that person's permission is subject to monetary fines or imprisonment. *See* CAL. PENAL CODE § 502 (d)(1-2) (West 2010).

As an example, suppose a person questioning his sexual orientation uses his website or his digital self to explore and come to terms with that aspect of his life. If a hacker takes over his account and causes harm, a simple civil trespass action for hacking may fail to remedy the full range of psychological consequences that the hacker has created. The victim may be driven to self-loathing or self-denial, experience deep feelings of persecution or rejection, cause harm to himself or others, or take his own life. As a real-world example, a girl named Megan Meier committed suicide after suffering an incident of cyber-bullying on Facebook.¹¹ Had she not committed suicide, civil and criminal law would provide few remedies for justice, and almost none would allow Megan to recover for the clear psychological damage she suffered.¹² In Megan's case, she could possibly sue for intentional infliction of emotional distress. However, an intentional infliction of emotional distress case prevents plaintiffs from recovering for any financial loss to their website or Second Life character.

Some victims may need more than simple recognition that an online harm caused emotion distress; they may be better helped by legal recognition that what the perpetrator did was a battery on them, and caused a direct harm to their physical being. Online victims can suffer serious damage as a result of digital actions taken against them. Simple recognition by society that these people suffered concrete attacks on their identities may do more for the healing process than any punishment to the perpetrator. Only recognition of the wrongful action as a battery can potentially make them whole again.¹³ However, given the elements of the tort of battery, only the flexibility of offensive contact battery provides plaintiffs with a viable cause of action against the individuals who caused them harm online. This is because it allows plaintiffs to recover not only for financial losses, but also for any psychological damage they may suffer.

This Article seeks to apply the tort of offensive contact battery to the digital age, exploring whether a cause of action for cyber-battery would survive under current law. It concludes that it is entirely possible for an offensive contact cyber-battery suit

¹¹ P.J. Huffstutter, *A Town Fights Back in Myspace Suicide Case*, L.A. TIMES, Nov. 22, 2007, available at <http://www.latimes.com/news/local/la-me-myspace22nov22,0,6270775.story>.

¹² See Megan Meier Foundation, <http://www.meganmeierfoundation.org> (last visited Mar. 23, 2010).

¹³ This is so because the law of assault cannot be reconciled with digital harms, because assault requires the victim to actively perceive the harm as it is occurring. Because of the nature of data transmission, the victim of a digital harm cannot possibly perceive the harm the moment the perpetrator carries it out. Thus, the victim is unable to claim he suffered a criminal or civil assault.

to succeed under the law of the Second Restatement of Torts.¹⁴ Part II of this Article reviews the elements and law of offensive contact battery, and discusses the current technological landscape, which allows for successful cyber-battery claims. Part III discusses specific psychology-based arguments, which allow for a digital harm to in some cases rise to the level of a valid offensive contact battery claim. Finally, Part IV briefly discusses the critical role expert witnesses must play if an offensive contact cyber-battery case is to succeed.

II. BATTERY ELEMENTS AND APPLICATION TO CYBER-BATTERY TORT

Before proceeding to develop and apply the cyber-battery tort, one must make two assumptions. First, one must assume that jurisdiction is properly established. Second, one must assume that the anonymity issue often inherent in online activity is not present, or that evidence is available to prove the defendant's identity.¹⁵ Section 18 of the Restatement (Second) of Torts states that:

An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) an offensive contact with the person of the other directly or indirectly results.¹⁶

Offensive contact battery requires that the defendant act, without consent, intending to cause an offensive contact with the plaintiff, directly or indirectly.¹⁷ This tort is broken into seven specific areas of discussion: (a) the act, (b) intent, (c) offensive touching, (d) causation, (e) lack of consent, (f) lack of privilege, and (g) damages. A plaintiff must prove all of these elements in order for a plaintiff to succeed in a cyber-battery case.

¹⁴ See discussion *infra* Part II.A-G, III.A-B.

¹⁵ In some scenarios, the victim will know the identity of the defendant, but given the anonymous nature of the Internet, there may be situations in which a suit must proceed against a John Doe defendant until the defendant's identity can be determined during discovery. In scenarios (such as password theft) that result in the harm, for the sake of discussion we should assume that the identity of the defendant is known.

¹⁶ RESTATEMENT (SECOND) OF TORTS § 18 (1965).

¹⁷ *Id.*

A. Act

The meaning of the word “act” is governed by Section 2 of the Second Restatement of Torts. The term “act” refers to “an external manifestation of the actor’s will, and does not include any of its results,” no matter how direct, immediate, or intended the results are.¹⁸ For example, if the actor points a pistol at another and pulls the trigger, the “act” is the pulling of the trigger, not the contact of the bullet hitting the person.¹⁹

In the context of cyber-battery, the “act” is the defendant’s action, which created the digital harm. Examples of digital acts include typing on a keyboard, clicking with a mouse, or designing and launching a computer virus. Because “act” refers to an external manifestation of the actor’s will, rather than the results, all that a plaintiff must prove is this simple external action.²⁰ A defendant’s “act” is relatively easy to prove in cyber-battery cases. The greater challenge in satisfying this element is identifying the defendant and linking him to the action that caused harm.

B. Intent

To prove intent, the plaintiff generally must show that the defendant performed an act with the intent to inflict an offensive touching on the plaintiff or a third person.²¹ The word “intent” denotes that the actor desires to cause the consequences of his act, or that he believes the consequences are substantially certain to result from it.²² In essence, the defendant simply needs to desire the harmful or offensive touching, or believe that the offensive touching was substantially certain to result from his act.²³

The Section 8A intent test is a subjective test based on what was in the defendant’s mind when he acted.²⁴ A jury would not

¹⁸ *Id.* § 2.

¹⁹ *Id.* § 2 cmt. c.

²⁰ *Id.*

²¹ RESTATEMENT (SECOND) OF TORTS § 18(1)(a) (1965).

²² *Id.* § 8A.

²³ *See, e.g.,* Garrett v. Dailey, 279 P.2d 1091, 1094 (Wash. 1955) (explaining that “unless he [the actor] realizes that to a substantial certainty, the contact or apprehension will result, the actor has not that intention which is necessary to make him liable...”). *See also* Frey v. Kouf, 484 N.W.2d 864, 867 (S.D. 1992) (“To establish intentional conduct, more than the knowledge and appreciation of risk is necessary; the known danger must cease to become only a foreseeable risk which an ordinary, reasonable, prudent person would avoid (ordinary negligence), and become a *substantial certainty*.” (emphasis in original) (quoting VerBouwens v. Hamm Wood Products, 334 N.W.2d 874 (S.D. 1983))).

²⁴ RESTATEMENT (SECOND) OF TORTS § 8A (1965).

ask what a reasonable person would have desired or believed, but rather what this particular defendant in fact desired or believed.²⁵

All consequences which the actor desires to bring about are intended Intent is not, however, limited to consequences which are desired. If the actor knows that consequences are certain or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.²⁶

The defendant's motive is immaterial; tort law is only concerned with whether the defendant had the requisite intent based on desire or belief, or under the substantial certainty test.²⁷

The Second Restatement of torts also contains a caveat - because the interest protected by offensive contact battery is a dignitary interest, the contact must be an intentional *invasion*.²⁸ There is no liability for an act involving a risk, no matter how great or unreasonable, if the risk is only causing an offensive contact.²⁹ The interest in freedom from bodily contact that causes no tangible harm, but is merely offensive to a reasonable sense of personal dignity, is "protected only against acts which are intended to invade it or to invade some other interest of personality of the person who is touched."³⁰ This is contrary to the interest in freedom from bodily harm, which is protected against intentional invasions, negligence, and unintentional, reckless invasions. Thus, Section 18 of the Second Restatement requires that the defendant act with the purpose of bringing about an offensive contact, or with knowledge that such a result is substantially certain to occur.³¹

Considering the nature of harms that would give rise to a cyber-battery claim, the intent element is likely easy for a plaintiff to establish, particularly with the assistance of a

²⁵ *Id.*

²⁶ *Id.* § 8A cmt. b. *See also* Vosburg v. Putney, 50 N.W. 403, 404 (1891) ("The rule of damages in actions for tort was held... to be that the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him.").

²⁷ RESTATEMENT (SECOND) OF TORTS § 20 (1965) (stating that if an act "causes an offensive bodily contact to the other, the actor is subject to liability to the other although the act was not done with the intention of bringing about the resulting offensive contact").

²⁸ *Id.* § 18 cmt. g.

²⁹ *Id.*

³⁰ RESTATEMENT (SECOND) OF TORTS Intro. Notes (1965).

³¹ *Id.* § 18, cmt. e.

computer expert. Acts of creating or sending a computer virus, hacking into a webpage, stealing a password, or destroying a piece of digital property all require a deliberate and intentional act. A defendant who performs any of those acts, among others, knows with substantial certainty what consequences will result. If a plaintiff can lay out, in exact detail, the steps taken by the defendant, this is normally sufficient to show a jury that the defendant intended the consequences of his actions.

C. Offensive Touching

To make a case for battery, the plaintiff must show that the defendant's intentional act resulted in an offensive touching of the plaintiff's person, or something so closely associated with the plaintiff as to make the touching tantamount to a physical invasion of the plaintiff's person.³² The definition of offensive contact under Section 18 of the Second Restatement is governed by Section 19.³³ A touching is offensive if it offends a reasonable person's sense of personal dignity.³⁴ A comment to Section 19 states that for a touching to offend "a reasonable sense of personal dignity," the contact must "offend the ordinary person" rather than a person "unduly sensitive as to his personal dignity."³⁵ Therefore, offensive contact is "contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted."³⁶ However, a caveat to Section 19 states that "[t]he Institute expresses no opinion as to whether the actor is liable if he inflicts upon another a contact which he knows [is] offensive to another's known but abnormally acute sense of personal dignity."³⁷

Section 18's broad scope, though, is the reason why a cyber-tort for battery is actionable. Comment (c) of Section 18 states that:

In order to make the actor liable under the rule stated in this Section, it is not necessary that he should bring any part of his own body in contact with another's person. It

³² *Id.* § 18.

³³ *See id.* § 19.

³⁴ *See id.* § 19.

³⁵ *Id.* § 19, cmt a.

³⁶ *Id.*

³⁷ *Id.* § 19, caveat; *See Richmond v. Fiske*, 160 Mass. 34, 35 N.E. 103 (1893) (allowing recovery where the defendant touched the plaintiff to wake him up and presented a milk bill after being told not to do so); *See also* RESTATEMENT (SECOND) OF TORTS § 27 (1965) (explaining that the actor is liable for assault if the act intends to put another in apprehension of immediate bodily contact even where a person of reasonable courage would not have been in such apprehension).

is enough that he intentionally cause his clothing or anything held or attached to him to come into such contact....Since the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body, it is not necessary that the plaintiff's actual body be disturbed. Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person....If the actor recognizes any object, however slightly or remotely attached to the other's person, as being so far a part of the other's personality that he can accomplish his purpose of offending the other by some contact with it, it is not unreasonable to regard the object in the same light and, therefore, to make the actor liable under the rule stated in this Section. This may well be so although the connection with the plaintiff's body is so slight that if the actor had dealt with the object as a thing and not as a means through which he could reach and offend the other's dignity, the other as a reasonable man should not regard the integrity of his person as violated.³⁸

This is the critical language on offensive contact battery. Specifically, Comment (c) sets forth the principles that govern offensive contact battery of all forms. This section sets the parameters for the tort and allows for the tort's application to digital harms.

Under Comment (c), a plaintiff's physical body does not need to be touched. The comment makes it clear that "it is not necessary that the plaintiff's actual body be disturbed."³⁹ The tort can proceed so long as the thing touched, "however slightly or remotely attached to the other's person," is "so connected with the body as to be customarily regarded as part of the other's person."⁴⁰ This principle was applied in early offensive battery cases. In a case from 1784, *Respublica v. De Longchamps*,⁴¹ the defendant struck the plaintiff's cane and was held liable for assault and battery. The U.S. Supreme Court held that the defendant's actions were "of that kind, in which the insult is more to be considered, than the actual damage; for,

³⁸ RESTATEMENT (SECOND) OF TORTS § 18, cmt. c. (1965).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 1 U.S. 111 (1784).

though no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal definition of the Assault and Battery....”⁴² This recognition that “the insult is more to be considered, than the actual damage”⁴³ is an acknowledgment that the offending behavior does not actually have to physically harm the plaintiff in order for the plaintiff to recover. Additionally, the Court noted that “anything attached to the person, partakes of its inviolability.”⁴⁴ These principles have expanded to cover other cases where no actual contact occurred, including instances of one spitting in another’s face,⁴⁵ knocking a flashlight out of another’s hand,⁴⁶ seizing a package being carried,⁴⁷ taking a plate from a person,⁴⁸ and snatching away a book.⁴⁹ Indeed, the court in *Fisher v. Carrousel Motor Hotel* stated clearly that “actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body.”⁵⁰

Comment (c) and case law also make it clear that a defendant can cause a battery by acting through an object that in turn acts upon the plaintiff, rather than acting directly on the plaintiff. This means that while in cases like *Fisher*⁵¹ and *Alcorn v. Mitchell*,⁵² where the defendant actually acted on the plaintiff’s body (grabbing a plate held in his hand and spitting in his face, respectively), direct, physical action is not necessary. For example, in *Garrett v. Dailey*,⁵³ the defendant was accused of committing a battery by pulling out a chair from underneath the plaintiff. There, the defendant’s action was not directly on the woman, but rather on the chair. The battery (the woman

⁴² *Id.* at 114.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See generally *Alcorn v. Mitchell*, 63 Ill. 553 (1872) (finding the defendant guilty of trespass where a person spat in the face of the defendant at the adjournment of trial).

⁴⁶ See generally *New Mexico v. Ortega*, 113 N.M. 437, 827 P.2d 152 (1992) (finding defendant guilty of battery where defendant knocked a flashlight from a police officer’s hand).

⁴⁷ See generally *Morgan v. Loyacombo*, 1 So.2d 510 (Miss. 1941) (finding defendant guilty of assault and battery when defendant followed suspected shoplifter out of store and forcibly seized the package).

⁴⁸ See generally *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967) (finding employee guilty of battery for snatching a plate from the hands of a guest at a buffet luncheon).

⁴⁹ See generally *S.H. Kress & Co. v. Brashier*, 50 S.W.2d 922 (Tex. Civ. App. 1932) (finding manager guilty of assault when violently jerked a pattern book from the hands of a customer).

⁵⁰ *Fisher*, 424 S.W. at 629 (citations omitted).

⁵¹ 424 S.W.2d 627 (1967).

⁵² 63 Ill. 553 (1872).

⁵³ *Garrett v. Dailey*, 279 P.2d 1091, 1094 (Wash. 1955).

falling to the ground) occurred as a result of the defendant's action of pulling the chair away. In the context of a cyber-tort, this allowance of indirect actions is critical, because a defendant committing cyber-battery can never act directly on the physical body of the plaintiff. The defendant must always utilize some instrument (usually a computer) in order initiate the touching.

Additionally, the language of Comment (c) does not state that the object acted upon must be physically attached, rather than emotionally or mentally attached to the person. Nor does the comment say that "person" only refers to a physical body.⁵⁴ Section 18 states only that the object acted upon must be part of the victim's personality, and that it is "so connected with the body" to be considered part of the person.⁵⁵ Comment (c) notes that the defendant's interpretation matters, and suggests that if the defendant believes he can offend the plaintiff by contacting the object, then the object is considered a part of the plaintiff and the defendant is liable.⁵⁶ Given the connection with identity and personality that some digital objects share, it is not a stretch to conclude that intangible digital objects can meet the standard of being "part of the person" under Comment (c).

Common law battery protections have extended to anything practically identified with the body, and a plaintiff's interest "includes all those things which are in contact or connected with it."⁵⁷ "[T]ouching anything connected with [the plaintiff's person], when done in a rude or insolent manner, is sufficient."⁵⁸ For example, in *Clark v. Downing*,⁵⁹ the plaintiff successfully sued the defendant for assault, after the defendant struck the plaintiff's horse. The important thing about *Clark* is that the plaintiff was not actually riding the horse or even around the horse when it was struck.⁶⁰ Instead, the plaintiff was inside a wagon that the horse eventually pulled.⁶¹ Yet, the court found a sufficient connection between the plaintiff and the horse to hold the defendant liable.

In the context of cyber-battery, the plaintiff is not attached to the website, the massively-multiplayer online role-playing game ("MMORPG"), or the avatar, but is instead connected to those things through the medium of the computer. Indeed, the plaintiff is not even connected to the actual computer all the time. Yet,

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ WILLIAM L. PROSSER ET AL., PROSSER AND KEETON ON TORTS 39 (5th ed. 1984).

⁵⁸ See *Morgan v. Loyacombo*, 1 So.2d 510, 511 (Miss. 1941).

⁵⁹ 55 Vt. 259 (1882).

⁶⁰ *Id.*

⁶¹ *Id.*

the plaintiff can argue that he has such an emotional and psychological connection with an object (website, avatar, computer, or message board) that for all purposes it is connected with him so much as to be a part of him, much like how Clark was connected to his horse.

Finally, Comment (c) notes that the standard for judging whether a thing is considered a part of the plaintiff's person is a "customarily regarded" standard, meaning that the standard is open to modification by changing societal views.⁶² Comment (a) of Section 19 also touches on this standard, stating that the requisite contact is "contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted."⁶³ In order to meet this standard of proof, the plaintiff will likely have to introduce evidence of an object being connected with his person, likely through expert testimony. Thus, a psychologist (while already necessary to prove damages) becomes critical to establishing the offensive contact element and surviving a motion for summary judgment. This expert testimony is discussed in greater detail in Part IV.

In addition to Comment (c), Comment (d) of Section 18 also impacts the application of offensive contact battery to online activity. Comment (d) states that "it is not necessary that the other should know of the offensive conduct which is inflicted upon him at the time when it is inflicted."⁶⁴ This comment makes it clear that the affront can be felt as keenly by the victim after the event as it can be when the event is being perpetrated, and that the wrong is no less wrong just because the victim may not perceive it at the exact moment it occurs.⁶⁵ Thus, an offensive wall posting, a hacking of a webpage or a deleted or assaulted avatar can all fall under a battery claim, even if the victim was not present at the moment the action took place. Comment (d) is absolutely critical to the survival of a cyber-battery claim, as most online harms occur when the victim is not present, or when the victim (by virtue of the nature of cyberspace) is unable to observe the battery.

If a plaintiff can establish through expert testimony that the target of the online touching was connected enough to the plaintiff's physical person, Comments (c) and (d) seem to allow this target to be considered as part of the plaintiff's person. If that target is a part of the plaintiff's person, the comments suggest that the defendant's conduct would constitute a touching for purposes of Section 18.

⁶² RESTATEMENT (SECOND) OF TORTS § 18, cmt. c.

⁶³ *Id.* § 19, cmt. a.

⁶⁴ *Id.* § 18, cmt. d.

⁶⁵ *Id.*

D. Causation

The Second Restatement of Torts requires that the harmful or offensive touching is caused by the defendant's act or some force set into motion by the act. This causation element is satisfied if the defendant's conduct "directly or indirectly" results in the injury.⁶⁶ Assuming anonymity is not an issue, establishing that the defendant's act caused the offensive touching is not difficult. All a cyber-battery plaintiff must do is present evidence that the defendant committed the act, and that the act caused the resulting harm. The Restatement of Torts and case law make no requirement that the act take place in the real world, as opposed to a digital environment, in order to show causation. In addition, as long as the defendant acted intentionally, the law will hold the defendant liable for the direct and indirect consequences of his acts, regardless of whether they were foreseeable.⁶⁷ This automatic liability prevents the defendant from arguing about any unanticipated consequences of his digital actions.

E. Lack of Consent

Under Section 892 of the Restatement of Torts, consent is defined as "willingness in fact for conduct to occur."⁶⁸ The Restatement codifies the common law principle of *volenti non fit injuria*, translated as: "to one who is willing, no wrong is done."⁶⁹ The Restatement allows consent to manifest either by action⁷⁰ or inaction, and notes that consent does not need to be communicated to the actor.⁷¹ Additionally, if words or conduct are reasonably understood by the actor to intend consent, then they constitute apparent consent.⁷² However, in order to meet the requisite consent, "the consent must be to the particular conduct of the actor, or to substantially the same conduct."⁷³ Consent (if it covers the particular conduct or substantially the same conduct perpetrated by the actor, or if the act is within the

⁶⁶ *Id.* § 13, § 18.

⁶⁷ *Id.*

⁶⁸ *Id.* § 892.

⁶⁹ See RESTATEMENT (SECOND) OF TORTS § 892A, cmt. a (1965).

⁷⁰ This concept is called consent in fact and includes scenarios in which the victim tells the defendant that the conduct in question was permissible. See RESTATEMENT (SECOND) OF TORTS § 892, cmt. b (1965).

⁷¹ RESTATEMENT (SECOND) OF TORTS § 892.

⁷² *Id.*

⁷³ *Id.* § 892A, cmt. c.

scope of any conditional consent) constitutes a complete bar to tort liability.⁷⁴ Thus, establishing a lack of consent is important to any plaintiff attempting to bring forth a claim of cyber-battery.

While it seems that there are few instances where a victim would consent to conduct that would constitute cyber-battery against digital property, the issue of consent is likely more problematic in the context of online games or virtual worlds. Duranske's argument against the viability of touch-based torts was based primarily on the idea of consent and the "magic circle"⁷⁵ concept of protected play.⁷⁶ That argument basically incorporates the *volenti non fit injuria* – "the volunteer suffers no wrong" – principle. The whole idea behind the "magic circle" is that "play should be protected from the reach of the real world" and that "the magic circle protects this play space from the intrusions of the law."⁷⁷ Because play is protected, legal remedies are not actionable when appropriate play results in injury.⁷⁸

However, when considering the "magic circle" concept and the applicability of a cyber-tort to online games, it is better to think of virtual gaming activities not in the context of wholly protected spheres of play, but rather in the context of other types of games.⁷⁹ In the context of athletic injuries, a plaintiff consents to injury from blows administered in accordance with the rules of the game, but not from deliberate blows which are illegal.⁸⁰ Applied to the online game and online world context, conduct is not actionable unless it falls outside the rules of the game or violates a terms of service agreement.⁸¹

⁷⁴ *Id.* § 892A(1).

⁷⁵ See generally HUIZINGA, *supra* note 6.

⁷⁶ DURANSKE, *supra* note 4, at 178-80.

⁷⁷ *Id.* at 178.

⁷⁸ *Id.* at 178-80.

⁷⁹ Duranske recognizes this principle, noting that "the key is that the consent only goes as far as the rules of the game permit." *Id.* at 178.

⁸⁰ See, e.g., *Turcotte v. Fell*, 502 N.E.2d 964, 967 (N.Y. 1986) ("This is particularly true in professional sporting contests, which by their nature involve an elevated degree of danger. If a participant makes an informed estimate of the risks involved in the activity and willingly undertakes them, then there can be no liability if he is injured as a result of those risks.").

⁸¹ For example, in the MMORPG World of Warcraft, it may be totally acceptable for one character to kill another if both have activated the appropriate function. However, the same act could be an actionable violation if the attacking player has hacked the game in order to allow him to kill non-consenting characters. Or, in the context of the internet-based virtual world Second Life, if a person sold a product that had a hidden script that would cause the purchaser's character to be harmed without consent then the seller could be held liable, though this might fall under cyber-products liability more than cyber-battery. See generally DURANSKE, *supra* note 4, at 178-80.

Additionally, with regards to the concept of Huizinga and Duranske's magic circle, an interesting situation might develop if a virtual world such as Second Life were to adopt a legal system as part of its in-game rules or terms of service. For example, if Second Life adopted parts of the Second Restatement of Torts, under the magic circle concept, "play" (the nature and rules of the game itself) is altered and has to adapt. Thus, the very notion of play would change to envision situations in which players are possibly charged and face potential real-world consequences for violations of the game rules. Indeed, this is perhaps exactly what the games creators desire: to have the real world influence and shape the way the game is played.

F. Lack of Privilege

Privilege is used "to denote the fact that conduct which, under ordinary circumstances, would subject the actor to liability, under particular circumstances does not subject him to such liability."⁸² Privilege "signifies that the defendant has acted to further an interest of such social importance that it is entitled to protection, even at the expense of damage to the plaintiff....[A] privilege exists when it is established that the defendant acts from a justifiable motive."⁸³ It should be noted that social context can define privilege.⁸⁴ For example, in *Vosburg v. Putney*, the defendant was held liable for battery for kicking the shin of the plaintiff in a school classroom after classes had begun.⁸⁵ The court stated that in the classroom, "no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school...."⁸⁶ The court contrasted the classroom setting with the setting of the school playground at recess; here, the same kick would likely not have violated the rules of that type of environment, particularly if the parties were engaged in sports or rough play.⁸⁷

In a cyber-battery case, a defense of privilege will almost never apply. Types of actions that would constitute cyber-battery are generally not the kinds of activities that promote important social interests. In fact, the typical cyber-battery action would likely run contrary to a wide range of legitimate and important social functions involving the Internet. Thus, only

⁸² RESTATEMENT (SECOND) OF TORTS § 10 (1965).

⁸³ PROSSER ET AL., *supra* note 57, § 16, at 109.

⁸⁴ MARSHALL S. SHAPO, PRINCIPLES OF TORT 22 (2d ed. 2003).

⁸⁵ See *Vosburg v. Putney*, 50 N.W. 403, 403-04 (1891).

⁸⁶ *Id.* at 404.

⁸⁷ *Id.* at 403-04.

in rare cases a privilege defense is applicable to defeat a cyber-battery claim.

G. Damages

A battery is complete upon commission of the harmful or offensive touching. The general principle on damages is that the wrongdoer is liable for all injuries resulting directly from the wrongful act, regardless of whether the injuries are foreseeable.⁸⁸ “[N]o harm or actual damage of any kind is required. A plaintiff is entitled to demand that a defendant refrain from offensive touching, although the contact results in no visible injury.”⁸⁹ Simply put, even if no actual harm is suffered, the court will award at least nominal damages. In addition to nominal damages, the plaintiff may recover damages to compensate him for the harm suffered, including amounts for general,⁹⁰ specific,⁹¹ and punitive⁹² damages.

The amount of damages a cyber-battery plaintiff can collect will change on a case-by-case basis depending on the nature of the harm, the consequences of the harm, the testimony of experts, and the jury. Because a cyber-battery plaintiff is automatically entitled to nominal damages, this pattern of variation will not bar a cyber-battery suit, even if the jury believes the plaintiff suffered no financial harm. It is important to note that for some cyber-battery plaintiffs, the amount of damages awarded, if any, may be insignificant in comparison to the personal value they derive from a jury simply validating their personal rights in the thing harmed by the defendant. Indeed, this jury acknowledgement of wrongdoing alone may be reason enough for some plaintiffs to pursue cyber-battery actions.

⁸⁸ *Id.* at 404.

⁸⁹ KEETON ET. AL., *supra* note 57, § 9, at 41. *See also* South Brilliant Coal Co. v. Williams, 292 So. 589, 591 (Wisc. 1921) (“If ... Gibbs kicked plaintiff with his foot, it cannot be said as a matter of law, that there was no physical injury to him. In a legal sense, it was a physical injury, though it may have caused no physical suffering, and though the sensation resulting there from may have lasted but for a moment.”).

⁹⁰ RESTATEMENT (SECOND) OF TORTS § 904 (1965) (defining general damages as compensatory damages for such a common harm resulting from the tortious act that the damages are anticipated and do not need to “be alleged in order to be proved”).

⁹¹ *Id.* (defining special damages as “compensatory damages for a harm other than one for which general damages are given”); *Id.* at cmt. b (“In personal injury cases, harm to earning capacity, expenses for medical treatment and similar items are ordinarily treated as bases for special damages.”).

⁹² *Id.* § 908 (defining punitive damages as damages different from compensatory or nominal, awarded to punish tortfeasor for his egregious conduct or awarded because the trier of fact believes the tortfeasor had a malicious intent or had a grave indifference “to the rights of others”).

III. PSYCHOLOGY – ESTABLISHING “OFFENSIVE CONTACT” THROUGH EXPERT TESTIMONY

For a cyber-battery tort to succeed, the plaintiff must prove that the defendant’s conduct constituted a touching of the plaintiff and that the object harmed is customarily regarded as part of the victim’s person.⁹³ The plaintiff will need the assistance of an expert psychologist (preferably one who focuses on identity, personality, and cyber-psychology) in order to elicit detailed testimony with enough accuracy and credibility to satisfy a court.

A cyber-battery plaintiff will have to use an expert because the tort involves a touching that may seem, at first glance, disconnected from the physical person claiming harm. The expert can show the fact-finder the fundamental link between self and cyber-self, which is necessary to establish a touching. By explaining this link, the expert will also show how the object “touched” is customarily regarded as part of the victim’s person.

A. Cyber-Touching Can Meet the Required ‘Touching’ Standard Under the Restatement

The ultimate issue in a cyber-battery tort is easily stated: how can a court consider a defendant’s act of harming an avatar, website, Facebook page, LiveJournal profile, or the like as a touching of the plaintiff? First, “harming” refers to the defendant’s act of wrongfully touching the digital thing, or deliberately causing damage to the digital thing. Not only does the action matter, but also the intent and the consequences. Relief is only provided to plaintiffs for harms that result from deliberate wrongs. If there is no digital wrong, then there is no digital harm. Thus, it would not constitute battery for two players in a video game to consensually duel each other to the death. However, it is a cyber-battery to hack into a person’s account and delete her characters, modify her website, or otherwise destroy or damage her property.

The Restatement of Torts requires the object touched to consist of “anything so connected with the body” or “so far a part of the other’s personality” as to be regarded as part of the plaintiff’s person.⁹⁴ However, it is not “necessary that the plaintiff’s actual body [is] disturbed.”⁹⁵ This standard allows for

⁹³ *Id.* § 18, cmt. c.

⁹⁴ *Id.*

⁹⁵ *Id.*

the possibility of an intangible object, such as a website or an avatar, qualifying as part of the plaintiff's person, provided that the object is highly connected to the plaintiff's body or personality. Indeed, the comments recognize that offensive contact can occur even if "the connection with the plaintiff's body is so slight that if the actor had dealt with the object as a thing and not as a means through which he could reach and offend the other's dignity, the other as a reasonable man should not regard the integrity of his person as violated."⁹⁶

With the growth of technology and its increasingly widespread availability, people today have the ability to interact in a variety of digital worlds and create a variety of online identities. People immerse themselves in their digital environments, their web pages, and their journals. They invest their emotions and time into these creations, and form attachments to them as real (in their minds) as their real-world connections. As a result, these digital objects become more than mere possessions; they become extensions of personality and self, with psychological consequences when they are harmed.

The idea that digital objects, and harm to those objects, affect their users' personality has been noted by many general observers. A clear example is the idea of virtual rape in digital worlds. In 1994, Julian Dibbell published *A Rape in Cyberspace*, which recounted an online incident in a text-based social game, where a character created an item which, when activated, described the graphic rape of other characters in explicit detail on the players' screens.⁹⁷ In the article, Dibbell described the outrage that arose over the conduct, and observed the real-world pain and anger that many of the victims expressed as a result of a purely digital action.⁹⁸ Regina Lynn from Wired Magazine has also noted the psychological impact of virtual rape:

There is no question that forced online sexual activity – whether through text, animation, malicious scripts, or other means – is real; and is a traumatic experience that can have a profound and unpleasant aftermath, shaking your faith in yourself, in the community, in the platform, even in sex itself...Virtual rape is not just a prank, one the target needs to get over or expect as part of a role-

⁹⁶ *Id.*

⁹⁷ Julian Dibbell, *A Rape in Cyberspace: Or, How an Evil Clown, a Haitian Trickster Spirit, Two Wizards, and a Cast of Dozens Turned a Database into a Society*, in *FLAME WARS: THE DISCOURSE OF CYBERSPACE* 237, 239-41 (Mark Dery, ed., 1994).

⁹⁸ *Id.* at 242-45.

playing world....A virtual rape is by definition sudden, explicit, and often devastating. If you've never immersed yourself in online life, you might not realize the emotional availability it takes to be a regular member of an internet community. The psychological aspects of relating are magnified because the physical aspects are (mostly) removed.⁹⁹

The connection between digital objects and personality has also been noted by psychologists, and has led to the growth of the field of cyber-psychology. In their studies, cyber-psychologists have seen the same connections and extensions of personality formed with digital objects as they have seen with real life objects. Sherry Turkle has noted:

The computer of course, is not unique as an extension of self. At each point in our lives, we seek to project ourselves into the world. The youngest child will eagerly pick up crayons and modeling clay. We paint, we work, we keep journals, we start companies, we build things that express the diversity of our personal and intellectual sensibilities. Yet the computer offers us new opportunities as a medium that embodies our ideas and expresses our diversity.¹⁰⁰

In the context of online games or chat rooms, where people have the chance to create or express various identities, Turkle has found "that for some this play has become as real as what we conventionally think of as their lives, although for them this is no longer a valid distinction."¹⁰¹

According to Turkle, forming extensions to and projecting personality onto digital objects is now quite common.¹⁰² "The Internet has become a significant social laboratory for experimenting with the constructions and reconstructions of self that characterize postmodern life. In its virtual reality we self-fashion and self-create."¹⁰³ But this self-fashioning and self-creation is not limited to just one identity or role. Turkle notes that "in postmodern times, multiple identities are no longer so much at the margins of things. Many more people experience

⁹⁹ Regina Lynn, *Virtual Rape Is Traumatic, but Is It a Crime?*, WIRED, May 4, 2007, http://www.wired.com/culture/lifestyle/commentary/sexdrive/2007/05/sexdrive_0504.

¹⁰⁰ SHERRY TURKLE, *LIFE ON THE SCREEN: IDENTITY IN THE AGE OF THE INTERNET* 31 (1995).

¹⁰¹ *Id.* at 14.

¹⁰² *See id.* at 31.

¹⁰³ *Id.* at 180.

identity as a set of roles that [are] mixed and matched, whose diverse demands need to be negotiated.”¹⁰⁴ This school of thought recognizes how online objects are linked to personal identity, and how many people experience identity in this manner.

The concept of multiple identity expression is not a new one, nor is it limited to the context of the Internet.

The idea that individuals possess multiple senses of self and identity has long been discussed in psychology and sociology. William James noted, “A man has as many social selves as there are individuals who recognize him.” One important historical version of the multiple self notion is the distinction between the public and private self (e.g., Baumeister). Both Goffman and Jung focused on this distinction. Goffman used the metaphor of the theatre to describe the multiplicity of self and identity. He argued that people wear different masks for their various social interactions, playing at the role(s) best suited for a particular situation and audience, and only going maskless when in private. For Jung, one’s conscious ego (the self that is presented to others) is less authentic than is the unconscious ego – in other words, according to Jung, one’s real individuality resides in one’s private self. More recently, further distinctions have been made in the idea of multiple selves. The tendency for people to have potential senses of self that they have not yet realized and, indeed, may never realize, has been examined. Markus and Nurius first broached this concept of possible selves. Possible selves are those selves that we possibly might become in the future. They include versions of self that we would like to become as well as those we hope to avoid becoming (i.e., the ‘dreaded self’). Along similar lines is the conception of the “ideal self,” which contains those attributes of self-hood that we would ideally like to possess and which we strive to become. Although possible and ideal selves are not selves currently possessed by the individual, they do not exist only in the

¹⁰⁴ *Id.*

abstract. Rather, they serve as important guides to actual behavior in the present (Higgins).¹⁰⁵

Indeed, “extending one’s sense of self in the form of abstract representation” has been described as “one of our most fundamental expressions of humanity.”¹⁰⁶

In the realm of online games such as Multi-User Domains or Multi-User Dungeons (“MUD”) and MUDs of the Object-Oriented variety (“MOO”), personal identity has been dramatically affected by the connections players have with their characters and their virtual worlds. Digital environments “encourage both time and emotional investment from the users, and . . . users derive salient emotional experiences from these environments.”¹⁰⁷ Users also create avatars¹⁰⁸ and then use those avatars to explore and interact with their environments. “Avatars have become a popular way of projecting one’s personality on the Internet.”¹⁰⁹ While sometimes they are used as a disguise to hide a person’s identity, other times they reveal more about a person than known in a face-to-face meeting.¹¹⁰ Avatars “have the effect of increasing a person’s sense of presence in . . . cyberspace” and this “sense of embodiment in cyberspace” plays an important role in how people relate to others in the

¹⁰⁵ Katelyn Y.A. McKenna, *Through the Internet looking glass: Expressing and validating the true self*, in THE OXFORD HANDBOOK OF INTERNET PSYCHOLOGY 205, 206-07 (Adam N. Joinson et al. eds., 2007) (citations omitted). *See also* WILLIAM JAMES, PSYCHOLOGY: THE BRIEFER COURSE 179 (1892); E. Tory Higgins, *Self-Discrepancy: A Theory Relating Self and Affect*, 94 PSYCHOL. REV. 319 (1987) (describing how we have different versions of ourselves, the ideal self, the ought self and actual self, and how discrepancies between these selves lead to issues); Hazel Markus & Paula Nurius, *Possible Selves*, 41 AM. PSYCHOL. 954 (1986); Roy F. Baumeister, *Preface*, in PUBLIC SELF AND PRIVATE SELF v-vii (Roy F. Baumeister ed., 1986) (describing the evolution of public and private self). *See generally* ERVING GOFFMAN, THE PRESERVATION OF SELF IN EVERYDAY LIFE (1959) (discussing a novel perspective, the theater, on analyzing how we interact with others); C.G. JUNG, Two ESSAYS ON ANALYTICAL PSYCHOLOGY (R.F.C. Hull trans., Bollingen Foundation 2d ed. 1966) (1953) (discussing his theories on consciousness, unconsciousness, and how the two interact).

¹⁰⁶ Jeremy N. Bailenson & Andrew C. Beall, *Transformed Social Interaction: Exploring the Digital Plasticity of Avatars*, in AVATARS AT WORK AND PLAY: COLLABORATION AND INTERACTION IN SHARED VIRTUAL ENVIRONMENTS, 1,2 (Ralph Schroeder & Ann-Sofie Axelsson, eds. 2006).

¹⁰⁷ Nick Yee, *The Psychology of Massively Multi-User Online Role Playing Games: Motivations, Emotional Investment, Relationships and Problematic Usage*, in AVATARS AT WORK AND PLAY: COLLABORATION AND INTERACTION IN SHARED VIRTUAL ENVIRONMENTS 187, 194 (Ralph Schroeder & Ann-Sofie Axelsson eds. 2006).

¹⁰⁸ *See* KENT L. NORMAN, CYBERPSYCHOLOGY: AN INTRODUCTION TO HUMAN-COMPUTER INTERACTION 284 (2008) (describing an avatar as the incarnation of one’s personality in the digital world).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 285-86.

online world.¹¹¹ Scholars have found that subjects with avatars experience higher levels of immersion, involvement, and awareness in digital environments.¹¹²

Digital activities can become so immersive that “[s]ome participants begin to confuse what happens in their simulated life with their real one.”¹¹³ This is not a new phenomenon. When a person plays a character in a fantasy game he begins to identify with that character and experience the emotions and feelings of that character.¹¹⁴ In researching MUDs, Turkle found that “[f]or many game participants, playing one’s character(s) and living in the MUD(s) becomes an important part of daily life.”¹¹⁵ Because many game participants choose to “play aspects of themselves, MUDs can also seem like real life.”¹¹⁶ However, MUDs also become an area for identity construction, a context “for discovering who one is and wishes to be.”¹¹⁷ In the realm of personal sexual exploration, Regina Lynn notes that digital “adult communities facilitate our need to go deeper into our sexual selves, even into secret places around gender and taboos that we cannot acknowledge anywhere else. We feel safe because of the peculiar blend of disclosure and anonymity provided in online communities, and we journey along paths we might not even glance at in the physical world.”¹¹⁸ As Dibbell noted, many players experience a recognition that “what happens inside a MUD made world is neither exactly real nor exactly make-believe, but profoundly, compellingly, and emotionally meaningful.”¹¹⁹

In studying MUD players, Turkle found that some players construct lives more expansive than their real lives,¹²⁰ and that others form a relationship among various personae which are all an aspect of the player.¹²¹ “In sum, MUDs blur the boundaries between self and game, self and role, self and simulation [People] play who they are or who they want to be or who they don’t want to be” and players use their real selves as a

¹¹¹ *Id.* at 286.

¹¹² See, e.g., Michael Gerhard, David Moore, & Dave Hobbs, *Embodiment and Copresence in Collaborative Interfaces*, 61 INTERNATIONAL JOURNAL OF HUMAN-COMPUTER STUDIES 453 (2004).

¹¹³ JANE M. HEALY, FAILURE TO CONNECT: HOW COMPUTERS AFFECT OUR CHILDREN’S MINDS – FOR BETTER AND WORSE 196 (1998).

¹¹⁴ See, e.g., GARY A. FINE, SHARED FANTASY: ROLE-PLAYING GAMES AS SOCIAL WORLDS 205 (1983) (describing the social and cultural systems in role-playing games).

¹¹⁵ Turkle, *supra* note 100, at 183.

¹¹⁶ *Id.* at 184.

¹¹⁷ *Id.*

¹¹⁸ Lynn, *supra* note 99.

¹¹⁹ Dibbell, *supra* note 97, at 244.

¹²⁰ Turkle, *supra* note 100, at 193.

¹²¹ *Id.* at 190.

composite of their characters or use their characters “as means for working on their RL lives.”¹²²

In the context of online games, it is particularly important to note the distinction between acceptable actions in online play and unacceptable actions of digital harm. The tort of cyber-battery requires an intentional wrong. This requirement indicates a distinction between actions inherent in online games which are within the scope of risk accepted by a player, and actions outside the scope of risk.

In computer games like *World of Warcraft*, the rules are typically simple. The game builds in parameters for things it can control (such as players fighting players), and provides warnings for things it cannot control (such as foul language on game servers).¹²³ What constitutes a digital harm in the gaming context is determined by consulting the game rules (i.e., do the rules make it permissible for one user to hack into the account of another and delete his character?) or by reviewing how the allegedly harmful action occurred. For instance, it is not cyber-battery if one player made a comment during game play that insulted a particular racial group. However, it is cyber-battery if the perpetrator knew the victim was a member of that racial group, and began sending a continuous stream of racially offensive comments to the victim’s character or personal email account.

With environments such as personal websites, Facebook, and online journals, the best way to determine what is or is not socially acceptable is through consulting the terms of service. Terms of Service agreements often lay out the type of conduct that is acceptable and the conduct that is unacceptable. Civil and criminal law can also be consulted. It is likely that if certain conduct is disallowed by law, that conduct is not permissible on the site. While consent and scope of risk may play a part in the analysis, determining whether the action was wrongful and intentional is generally not difficult.

In free-form social worlds, determining whether conduct is wrongful is more complicated. These worlds typically exist as alternatives to the real world. Therefore, in addition to checking the Terms of Service of the overall program, users seeking to bring a cyber-battery action should also consult specific rules or agreements for each particular world. Sometimes, users may agree to make certain actions permissible that is otherwise impermissible. At other times, users may create harsher rules to

¹²² *Id.* at 192.

¹²³ *World of Warcraft Terms of Use*, <http://www.worldofwarcraft.com/legal/termsofuse.html> (last visited Aug. 30, 2010).

govern their behavior. These variables can all be taken into account when determining whether the victim placed herself within the scope of risk for the type of harm she claims to have suffered. These variables are also considered in determining whether the allegedly harmful conduct was an intentional wrong.

The connection between identity and self on the Internet is not just limited to the realm of online games. The realm of online personality creation is also important. Online personalities are created in a number of ways. Turkle has commented that “[o]n the Web, the idiom for constructing a ‘home’ identity is to assemble a ‘home page’ of virtual objects that correspond to one’s interests.”¹²⁴ Online personality creation causes the user to form a connection with these virtual objects.¹²⁵ “[T]hose who become most immersed in Internet culture develop a sense of synesthesia which allows them to exercise all of the senses through their eyes and fingers.”¹²⁶ This synesthesia allows users to “experience the movement ‘into’ cyberspace as an unshackling from real-life constraints – transcendence rather than prosthesis” – and through virtual identity-play, they can remain themselves in some lasting way.¹²⁷ However, sometimes “a person’s on-line persona becomes so finely developed that it begins to take over their life *off* the net.”¹²⁸ In this manner and others, online personas can profoundly affect offline personas.

Katelyn McKenna described an online potential for self-discovery in terms of a person’s search for his true self.¹²⁹ “The true self is said to be comprised of identity-important aspects of

¹²⁴ *Id.* at 258; see also Yair Amichai-Hamburger, *Personality and the Internet*, in *THE SOCIAL NET: HUMAN BEHAVIOR IN CYBERSPACE* 27, 41-42 (Amichai-Hamburger ed., 2005) (describing personal websites as a “construction of identity” and as capable of manipulation and experimentation by a person contemplating which part of his or her identity to display).

¹²⁵ See Richard C. Sherman, *The Mind’s Eye in Cyberspace: Online Perceptions of Self and Others*, in *TOWARDS CYBERPSYCHOLOGY: MIND, COGNITION AND SOCIETY IN THE INTERNET AGE*, 66 (Guiseppe Riva & Calo Gamilberti eds., 2001) (noting that home pages are illustrations of self-presentation that make it possible to express a sense of self on an unparalleled scale) *but c.f.* Sandra Y.M. Chan, *Wired_Selves: From Artifact to Performance*, 3 *CYBERPSYCHOLOGY & BEHAVIOR*, 271, 273 (April 2000) (noting that home pages are like physical space as a place where people project personalities, hopes, dreams, and fears creating symbolic presentations).

¹²⁶ Shawn P. Wilbur, *An Archaeology of Cyberspace: Virtuality, Community, Identity*, in *THE CYBERCULTURES READER* 45, 48 (David Bell & Barbara M. Kennedy eds., 2000).

¹²⁷ *Id.*

¹²⁸ Allucquère Rosanne Stone, *Will the Real Body Please Stand Up?: Boundary Stories About Virtual Cultures*, in *THE CYBERCULTURES READER*, *supra* note 126, at 506 (emphasis added).

¹²⁹ McKenna, *supra* note 105, at 207.

self that an individual currently possesses, yet is generally unable to readily express to others in most situations, despite very much wishing to do so.”¹³⁰ McKenna argues that there are numerous reasons why the true self is either not expressed to others, or not accorded proper validation if expressed. These reasons include role expectancies and constraints within society, conditional acceptance by peers and family, social anxiety, loneliness, and the need for containment of personal information.¹³¹ Yet McKenna found that “the Internet is a potentially powerful means by which people can express their true selves and meet important social and psychological needs that are not being met in real life.”¹³²

McKenna’s analysis is similar to Turkle’s concept of the Internet as a “social laboratory” for experimenting with self and identity.¹³³ McKenna argues that “expressing and gaining validation and acceptance for these aspects of self” that sometimes are only expressed through the Internet, “often has important implications for one’s sense of self, as well as for one’s close relationships.”¹³⁴

Heidi Figueroa-Sarriera¹³⁵ describes the relationship between online personae and real people “as a sort of heteronymous-autonomous self.”¹³⁶ “In virtual spaces,” she writes, “One has parallel identities which . . . can become parallel selves and lives”¹³⁷ by allowing “the possibilities for self-discovery, even self-transformation.”¹³⁸ Each virtual self has its own construction and also has a construction with the real self. Both the virtual selves and the real self continuously explain their identity formation projects with the other.¹³⁹ “In short, as *disembodied subjects*, we represent ourselves in various ways in virtual space, but at the same time, this virtual experience continues to interrogate the territorialized (*embodied*) subject, keeping up a sort of extended conversation through self-reflection that is now unfolding or transmuting

¹³⁰ *Id.*

¹³¹ *Id.* at 208-10.

¹³² *Id.*

¹³³ Turkle, *supra* note 100, at 180.

¹³⁴ McKenna, *supra* note 105, at 205.

¹³⁵ Heidi J. Figueroa-Sarriera, *Connecting the Selves: Computer-Mediated Identification Processes*, in CRITICAL CYBER-CULTURE STUDIES 97 (David Silver & Adrienne Massanari eds. 2006).

¹³⁶ *Id.* at 103.

¹³⁷ DON TAPSCOTT, GROWING UP DIGITAL: THE RISE OF THE NET GENERATION 96-97 (1998).

¹³⁸ Turkle, *supra* note 100, at 260.

¹³⁹ Figueroa-Sarriera, *supra* note 135, at 103.

from the open space to the territory.”¹⁴⁰ The end result is that these “self-reflection processes” create “a subject and a body that cannot be reduced to an entity,” where the distinctions between the virtual personae and the embodied personae do not matter.¹⁴¹

Yair Amichai-Hamburger, who conducted a study of online chatting users, describes the self-discovery component of the Internet as a search for the “real me.”¹⁴² The Internet is important for online chatters because “[t]he unique protection afforded by the Internet encourages people to use it as a haven in which to explore their identity.”¹⁴³ Amichai-Hamburger notes that “for a significant number of people such as introverts, neurotics, lonely people, and people with social anxiety, the Internet may become a very significant part of their lives and perhaps the only one in which they truly express themselves.”¹⁴⁴

Individuals can form strong connections with online activities, and they can use those activities to formulate new forms of identity. Therefore, it is possible for a psychologist to testify that harm to an online activity constitutes a touching. In the nineteenth-century Vermont case, *Clark v. Downing*,¹⁴⁵ the court found an offensive battery when the defendant struck the plaintiff’s horse as the plaintiff sat in his wagon. The modern equivalent is striking a plaintiff’s car, either while the plaintiff is inside the car, or in, say, an RV or boat attached to the car. If such an act would constitute an offensive battery, a strong case is made that destroying or damaging a tool, which helps constitute part of a person’s entire identity, is certainly an offensive battery. While one can invest a good deal of himself in a horse or a car, in the online context, one uses potentially vulnerable tools to develop and refine his very personality and concept of self.

Suppose, for example, that B kicks A’s car. A may suffer aggravation, anger, or fear. However, if B destroys A’s online identity or an aspect of that identity, A could suffer aggravation, anger, fear, a loss of identity, and emotional trauma, as well as other psychological harms that could take considerable time to fix. As another example, suppose A uses her online avatar and personal website to explore her masculine side. If B damages those things through sending A sexually explicit attacks or

¹⁴⁰ *Id.* (citing Heidi J. Figueroa Sarriera, *In and Out of the Digital Closet: The Self as Communication Network*, in *CYBERPSYCHOLOGY* 141-42 (Angel J. Gordo-López & Ian Parker eds. 1999) (emphasis in original)).

¹⁴¹ Figueroa-Sarriera, *supra* note 135, at 103.

¹⁴² Amichai-Hamburger, *supra* note 124, at 27.

¹⁴³ *Id.* at 38.

¹⁴⁴ *Id.* at 37.

¹⁴⁵ *Clark v. Downing*, 55 Vt. 259 (1882).

insults, A might end up pushing away from or repressing those aspects of her personality, thus causing long-term psychological damage.

Given the extensive development of cyber-psychology as a field, experts are likely capable of introducing evidence to a court of the profound connection between self and digital self. With the development and increasing availability of cyber-psychological research, expert opinions regarding a plaintiff's psychological connection to a digital object should generally meet the evidentiary standards for admissibility in court.¹⁴⁶ Expert opinions of this sort should certainly provide enough evidence to survive a motion for summary judgment, and are likely admissible as evidence to prove a touching under the law of offensive contact battery.

*B. The Object of a Cyber-Touching can be Customarily
Regarded as Part of the Plaintiff's Person*

Under Section 18 of the Restatement (Second) of Torts, the contact at issue must be with anything so connected with the body as to be customarily regarded as part of the other's person.¹⁴⁷ Therefore, it must "be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted."¹⁴⁸ This approach focuses on community standards, and requires a psychological expert to testify that online activities can become so important to a person that they are customarily regarded as part of their person.¹⁴⁹ The Section 18 standard is met by presenting evidence of the impact that online activity can have on a person,¹⁵⁰ and also presenting evidence of the scientifically recognized multiple identity view.¹⁵¹ A judge then decides whether the "customarily regarded" standard is met.¹⁵² Therefore, an expert must present compelling testimony, given that many judges are older and possibly less familiar with (and open to) the idea of multiple computer identities.

¹⁴⁶ See discussion *infra* Part IV.

¹⁴⁷ RESTATEMENT (SECOND) OF TORTS § 18, cmt. c. (1965).

¹⁴⁸ *Id.* § 19, cmt. a.

¹⁴⁹ *Id.* § 18, cmt. c.

¹⁵⁰ See *supra* Part III.A.

¹⁵¹ See McKenna, *supra* note 105, at 205-06.

¹⁵² See FED. R. EVID. 104(a).

IV. EXPERT TESTIMONY

In order to win a cyber-battery case, a plaintiff must introduce evidence from two types of experts: a computer expert and a psychologist. The computer expert has two critical functions. First, he or she can offer testimony as to the defendant's specific act that created the battery. Second, and, more importantly, he or she is the one who establishes an indentifying link between the defendant and the defendant's online activity. The testimony of the plaintiff's psychologist is also critical. The psychologist is needed to establish a sufficient connection between the plaintiff and the item touched so that the defendant's action is classified as a harmful or offensive touching under the offensive contact battery requirements.¹⁵³ Additionally, the psychologist's testimony may enable the plaintiff to recover emotional distress damages, depending upon the nature and extent of the harm caused by the defendant.¹⁵⁴

Before admitting this expert testimony into evidence, the plaintiff's experts must satisfy qualification requirements and prove to the court that their testimony and opinions are reliable.¹⁵⁵ Given the lenient nature of the qualification requirements,¹⁵⁶ a plaintiff should have little trouble finding a qualified computer expert who can testify. Also, there is likely little difficulty in establishing the reliability of the computer expert's testimony pursuant to FED. R. EVID. 702. Finding a satisfactory psychologist, on the other hand, is likely more difficult, and might require a plaintiff to hire a psychologist who deals specifically in cyber-psychology. Additionally, problems may arise regarding the reliability of the psychologist's testimony. As a threshold matter, under the Federal Rules of Evidence, the expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue."¹⁵⁷ In addition, testimonial reliability must be satisfactorily shown, in accordance with the standards set forth in *Daubert v. Merrill*

¹⁵³ See *supra* Part III.A-B.

¹⁵⁴ Henry Fradella et al., *The Impact of Daubert on the Admissibility of Behavior Science Testimony*, 30 PEPP. L. REV. 403, 423 (2003) ("Given that the law recognizes a compensable tort for both the intentional and negligent infliction of emotion distress, it is not surprising that courts routinely accepts the testimony of psychologists and psychiatrists regarding the types of emotional distress someone may have suffered.").

¹⁵⁵ These standards must be in accordance with FED. R. EVID. 702 & 703, or the appropriate state rules of evidence, in addition to the standards set forth by the applicable evidentiary case law.

¹⁵⁶ An expert can be qualified by "knowledge, skill, experience, training, or education." See FED. R. EVID. 702.

¹⁵⁷ FED. R. EVID. 702.

*Dow*¹⁵⁸ and *Kumho Tire v. Carmichael*,¹⁵⁹ or the reliability standards of the appropriate state regarding expert testimony. A plaintiff's failure to provide such testimonial reliability likely leads to the expert's exclusion by the court and the case's dismissal through summary judgment or directed verdict.

Given the essential nature of expert testimony in cyber-battery actions, experts must be permitted to testify in order for such actions to have any chance of success. A cyber-battery plaintiff's failure to obtain admissible testimony from qualified experts will likely spell the end of his claim.

V. CONCLUSION

The development of new digital applications, games, and web content provides us with an ever-expanding array of ways to interact and exist in the digital world. As we continue to immerse ourselves in digital activities, and as we raise our children in a world where having an online presence is the norm, the likelihood of us becoming victims of harmful online activities increases. Additionally, as the Internet becomes more prevalent in our lives, its psychological effects will also continue to expand.¹⁶⁰

If we are confronted with certain harmful online actions, we may suffer personal and psychological harm similar to the harm resulting from traditional torts committed in the real world. These harmful online actions should become increasingly commonplace as the Internet becomes a more dominant part of our daily lives.¹⁶¹ Therefore, people need a means to protect themselves from being harmed over the Internet.

In order to recognize cyber-battery as an actionable tort, legal recognition that digital harms have real world consequences is required. What occurs online does not necessarily stay online. Harm is caused regardless of whether

¹⁵⁸ 509 U.S. 579, 593-94 (1993) (modifying the Federal Rule of Evidence 702 three-part requirement for testimony by allowing judicial discretion as to the reliability of expert testimony based on a four-part test).

¹⁵⁹ *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999) (expanding the *Daubert* requirements to all expert knowledge and also modifying the applicability of *Daubert*).

¹⁶⁰ For example, one scholar, David Levy, has written extensively about how people might be affected in the area of love and sex by continual digital interactions with computers and robots. Levy also writes on how current bonding between people and their electronic possessions is being affected by attachment theory and psychological changes as a result of our interactions with technology. See DAVID LEVY, LOVE AND SEX WITH ROBOTS: THE EVOLUTION OF HUMAN-ROBOT RELATIONSHIPS (2007).

¹⁶¹ This likelihood is particularly true if the Internet becomes a broad and widely accessible community forum, or if it becomes a primary means of personality development and expression.

one wrongfully knocks a plate out of a man's hand or wrongfully knocks an e-book out of an avatar's hand. Given the rapidly expanding nature of online activity and virtual worlds, we need to recognize that an intentional and wrongful harm is still an intentional and wrongful harm, no matter where it takes place. A person should not escape the consequences of his wrongful actions, particularly if his victim suffers severe psychological damage, simply by using the Internet as a defense.

Civil tort law already recognizes that some actions constitute battery even if the victim's physical body is not directly affected.¹⁶² The lack of a cyber-battery statute is possibly due to the nature of lawmakers. Individuals charged with making and modifying laws are typically much older than most of the people who will likely suffer digital harms at issue in a cyber-battery.¹⁶³ Lawmakers may not understand or recognize the harms that can result to victims of cyber-battery. Perhaps this is because they do not understand how a person is so involved in a digital world that he suffers consequences from harms that occur in that world. Most current lawmakers are not exposed to the Internet as much as the typical cyber-battery victim. These lawmakers are unlikely to have played the games, used the tools, or engaged in the activities referenced in a typical cyber-battery victim's complaint.

To change the law and promote an acceptance for cyber-battery actions, victims and victims' advocates must lobby lawmakers, as well as those close to lawmakers. Victims and their advocates should work with people in government who are connected to the digital activities at issue. They should explain where the harms lie and what can be done to address the harms. State bar associations should play a major role in speaking out for victims of cyber-battery and framing the issues created by the cyber-battery tort. They can also provide the legal expertise, financial backing, and statewide influence necessary to create changes in the law.

¹⁶² See *supra* Part II.A-G.

¹⁶³ In 2008, the average age of a member of the United States House of Representatives was 55.9, and the average United States Senator was 61.7 years-old. See CONGRESSIONAL RESEARCH SERVICE: THE LIBRARY OF CONGRESS, CRS REPORT FOR CONGRESS: MEMBERSHIP OF THE 110TH CONGRESS: A PROFILE 1, *available at* <http://www.senate.gov/reference/resources/pdf/RS22555.pdf>. Individuals among the ages of 55 and older are less likely to use the Internet for activities that often give rise to cyber-battery such as social networks, virtual worlds, and online games. See Memorandum from Sydney Jones, Research Assistant & Susannah Fox, Associate Director, PEW Internet & American Life Project (Jan. 28, 2009), *available at* http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Generations_2009.pdf.

Current tort law already has remedies for harms created through cyber-battery. The key now is to show that the harms suffered by victims of cyber-battery are real, and that these harms can be addressed through tort remedies. Current psychological research on personality development, as well as research in the rapidly growing field of cyber-psychology, can show a court that cyber-harms can meet the ‘touching’ standard under the Restatement of Torts.¹⁶⁴ This research can show that digital objects touched can be customarily regarded as part of the plaintiff’s person.¹⁶⁵ Similarly, it is possible that the results of this research can show lawmakers and judges that cyber-battery and its consequences are both real. By offering expert testimony, a plaintiff can establish the offensive touching element, and make out a *prima facie* case of cyber-battery.¹⁶⁶ These same expert witnesses can speak out at bar functions and conferences, as well as write articles to teach others about the harms of cyber-battery.

With the continued development of computer technology and increases in online activity, there is greater recognition for harms caused by wrongful online actions. As online wrongs continue to gain exposure, more and more people will see the need for a proper civil remedy. An offensive contact cyber-battery tort is a useful tool to protect online users from those who use the Internet for wrongful purposes. This tort can help give victims of online harm the financial recovery and emotional healing they desperately need. It will also send a message to perpetrators that the harms they create in the digital world are just as wrong as harms created in the real world.

¹⁶⁴ See *supra* Part III.A-B.

¹⁶⁵ See *supra* Part III.B.

¹⁶⁶ See *supra* Part IV.